

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

~~77-88451~~

To be argued by
KEVIN J. MCKAY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

77-2141

JAMES TRACY, WILLIAM ADAMS, ROBERT ARNOLD, ARTHUR
BETSCH, SANTOS CEPEDA, DOUGLAS COLEMAN, HAROLD
GONZALEZ, LENNELL HOWARD, ELLIOT HUNT, BILLY LITTLE,
LARRY MOORE, ROBERT OAKLEY, EMANUAL ORDINE, JR.,
LARRY PLEASANT, GEORGE REED, ANTHONY REPETTI,
CORDELL ROBINSON, WILLIAM RODRIGUEZ, DENNIS SOARES,
MICHAEL THOMAS, and JOHN TURRISI, on behalf of
themselves and all others similarly situated,

Plaintiffs-Appellees,

- against -

DOMINICK SALAMACK, Superintendent, Bayview
Correctional Facility; CAPTAIN HYLAN T. SPERBECK,
Correction Officer, Bayview Correctional Facility;
BENJAMIN WARD, Commissioner, Department of
Correctional Services, State of New York,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLANTS

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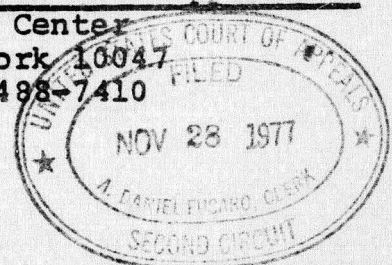


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BRIEF FOR DEFENDANTS-APPELLANTS

Preliminary Statement

This is an appeal from two orders of the United
States District Court for the Southern District of New York

(Lasker, J.). On October 14, 1977, the District Court, in granting plaintiffs-appellees' motion for a preliminary injunction, found that the plaintiffs were entitled to a due process hearing before their revocation from the temporary release program and ordered their reinstatement. On November 7, 1977, the District Court denied a motion by the defendants-appellants to alter or amend its order of October 14, 1977. On November 15, 1977, this Court granted a stay of the District Court's orders pending the appeal.

Questions Presented

(1) Whether the plaintiffs were entitled to a hearing under the Due Process Clause of the Fourteenth Amendment prior to their revocation from the temporary release program due to a change of law?

(2) Whether the orders of the District Court infringe upon the defendants' discretionary authority to operate its programs and determine which prisoners may participate in the temporary release program?

Statement of the Case

The temporary release program involves several diverse programs which were established to gradually reacquaint eligible inmates with society before their parole release.*

*A temporary release program encompasses a "work release program", a "furlough program", a "community services program", an "industrial training leave", an "educational leave", or a "leave of absence". N.Y. Correction Law, § 851(9) (McKinney's Supp. 1976-77) as amended, July 13, 1977. (See Appendix, pages 5-12 for copy of new statute) (Hereinafter page references to Appendix will be preceded by the letter A).

For the purposes of this case, we are only concerned with the work release and educational leave programs.* These two programs permit eligible prisoners the privilege of leaving the institution for a period not exceeding fourteen hours in any day for the purpose of employment or education, or for any matter related to such purposes. N.Y. Correction Law, §§ 851(3) and (7).

The Commissioner of the Department of Correctional Services promulgates the rules and regulations for the administration of the temporary release program and appoints a temporary release committee for each facility designated as a work release facility. N.Y. Correction Law, §§ 852(1)-(4). The temporary release committee has the authority to formulate modify and revoke temporary release programs at an institution. N.Y. Correction Law, § 851(11).

Any eligible inmate may make an application to the temporary release committee of the facility for permission to participate in the temporary release program. If the committee determines that a temporary release program is "consistent

*There were three inmates in the plaintiffs' class who were either enrolled in educational programs or scheduled to begin such programs in September, 1977. The remainder were in the work release program. Of those in the work release program, approximately half of the plaintiffs were employed at the time of their removal. (A. 54)

with the safety of the community and the welfare of the applicant, and is consistent with rules and regulations of the department", the committee will develop an appropriate program for the prisoner. N.Y. Correction Law, § 855(4).

After the temporary release committee approves the application, it prepares a memorandum setting forth the details of the program including the extended bounds of confinement.* This memorandum will be transmitted to the superintendent of the facility who will approve or reject it. If the superintendent approves the program, he will sign the memorandum. However, if the superintendent rejects the program, he shall state his reasons in writing and send his statement to the inmate and the Commissioner who shall review it. If the Commissioner disapproves the program, he shall also state his reasons in writing and place a copy of the reasons in the inmate's file. N.Y. Correction Law, § 855(5).

After an inmate has been approved to participate in a work release program, he must agree to be bound by all the terms and conditions of the program and acknowledge such agreement by

*The extended bounds of confinement include an area in which the inmate participating in the program may travel, the routes he may use, the places he may visit and the hours, days or the particular period he may be absent from the facility. N.Y. Correction Law, § 851(10).

signing the program memorandum beneath the following statement:

"I accept the foregoing program and agree to be bound by the terms and conditions thereof. I understand that I will be under the supervision of the state department of correctional services while I am away from the premises of the institution and I agree to comply with the instructions of any parole officer or other employee of the department assigned to supervise me. I understand that my participation in the program is a privilege which may be revoked at any time, and that if I violate any provision of the program I may be taken into custody by any peace officers and I will be subject to disciplinary procedures. I further understand that if I intentionally fail to return to the institution at or before the time specified in the memorandum I may be found guilty of a felony." (Emphasis added) (see § 855[6] Cor. Law).

In Section 855(9), the State Legislature, in unequivocal language, indicates that an inmate has no vested interest in the program and that his participation is merely a privilege revokable at any time. Section 855(9) (§ 855[8] of predecessor statute) provides:

"Participation in a temporary release program shall be a privilege. Nothing contained in this article may be construed to confer upon any inmate the right to participate, or to continue

to participate, in a temporary release program. The superintendent of the institution may at any time, and upon recommendation of the temporary release committee or of the commissioner or of the chairman of the state board of parole or his designee shall, revoke any inmate's privilege to participate in a program of temporary release in accordance with regulations promulgated by the commissioner."

If an inmate participating in a temporary release program violates any provision of the program or any rule or regulation of the Commissioner, the inmate will be subject to the same disciplinary measures as if the violation had occurred within the prison. N.Y. Correction Law § 856(2). If an inmate in the program commits a disciplinary infraction, he will receive the same due process safeguards as an inmate in general confinement. It is the policy of the Department to afford a Superintendent's Proceeding to a work releasee charged with violating the Department's rules and regulations. See 7 NYCRR § 253. It is important to remember that none of the plaintiffs herein were revoked as a result of charges of misconduct. If that were the case, hearings would have been provided.* Plaintiffs' revocations were due to a change of law.

*In addition to Wolff rights being provided at a Superintendent's Proceeding, an inmate is also provided with use immunity, §§ 253.2(c) and 253.4(a); a recording of the hearing, § 253.4(b); the substantial evidence test, § 253.4(g) and (h); a review process, § 253.6; and assistance from an employee, § 253.3(a). See 7 NYCRR § 253, et seq.

The controversy in the instant case arose when the eligibility requirements to participate in the temporary release program were tightened by an amendment on July 13, 1977. Before the amendment, Section 851(2) provided that an inmate was eligible if he was

"a person confined in an institution who is eligible for release on parole or who will become eligible for release on parole or conditional release within one year. In the case of a person serving an indeterminate sentence of imprisonment imposed pursuant to the penal law in effect after September one, nineteen hundred sixty-seven, for the purposes of this article parole eligibility shall be upon the expiration of the minimum period of imprisonment fixed by the court or where the court has not fixed any period, after service of the minimum period fixed by the state board of parole."

The amendment, effective September 1, 1977, added the following conditions to the eligibility requirements:

"If an inmate is denied release on parole, such inmate shall not be deemed an eligible inmate until he is within one year of his or her next scheduled appearance before the state parole board. No person convicted of any escape or absconding offense defined in article two hundred five of the penal law shall be eligible for

temporary release. Notwithstanding the foregoing, no person who is an otherwise eligible inmate who is under sentence for a crime involving: (a) infliction of serious physical injury upon another as defined in the penal law, (b) a sex offense involving forcible compulsion, or (c) any other offense involving the use or threatened use of a deadly weapon may participate in a temporary release program without the written approval of the commissioner. The commissioner shall promulgate regulations giving direction to the temporary release committee at each institution in order to aid such committees in carrying out this mandate." (§ 851[2] as amended).

The amendment to the eligibility requirements was necessitated by the alarming increase in crimes including escapes of inmates participating in the temporary release program. (See McKinney's Session Laws of New York, September, 1977, No. 8, Albany letter, pp. 7-8). The amendment manifests a clear legislative intent to implement a more careful screening of inmates convicted of serious crimes and to increase the penalties for those who violate the rules. Other amendments were added to provide closer supervision of work releasees (§§ 852[5] and 855[8]), to establish accurate records with respect to participants in the program (§ 853) and to evaluate and assess the operation and success of the program (§ 854). All these amendments clearly reflect the Legislature's intention to completely reorganize the temporary release program.

The eligibility amendment resulted in the disqualification of certain inmates who were participating in the

temporary release program at the time of its enactment. In order to comply with the new temporary release legislation, the Department conducted an extensive and thorough review of all the prisoners participating in a work or educational release program to determine whether they were still eligible. The review process was conducted by several different correctional authorities.

Firstly, summaries of all cases were prepared by the parole services and reviewed with preliminary recommendations by the Temporary Release Staff.

Secondly, Central Office teams of three members, headed by an Executive Staff member, reviewed all inmates in a work or educational release program who fell within the statutory category of the new law. There were seven executive teams to carry out the review process at this level. The Executive Team Review established four categories of recommendations. These were: (A) recommended retention; (B) recommended rejection; (C) held for further information; and (D) request for special review. For those inmates placed in categories A and B, lists were compiled. For those inmates in category C, they were held for review with the superintendent's recommenda-

tions. For those inmates in category D, a special review was conducted by the Executive Deputy Commissioner for a decision.*

Thirdly, each facility superintendent with a temporary release program (work-education) reviewed all of the inmates participating in a program in their institution. Each institution superintendent then submitted a list with recommendations for retention and removal of inmates from the temporary release programs. A substantial number of those recommended for rejection were the same inmates which the executive review had also recommended for rejection.

The cases which had been marked for further information under the executive review (D), were reviewed against the superintendents' evaluations and such cases if recommended for rejection for the program were put on the list for rejection.

*To assist the review by the Central Office teams, staff members rated each application according to a point system. During the past year, the Department, in conjunction with the Vera Institute of Justice, has developed and tested a selection process for temporary release based on a point system which evaluates the record of each applicant. The point system is based on a statistical study of the performance of men and women who have participated in temporary release since 1971. Items in the point system were chosen on the basis of their ability to predict who will do well in temporary release. The point system acted only as a guide in the review procedures herein and was, by no means, the sole determining factor. (A. 55-56)

Those cases in this executive review category (D) recommended for retention by the superintendents were put on the list for retention. All of the other cases marked for rejection by the superintendents were then reviewed by the special review team.

Fourthly, a special review of all inmates approved or assigned to temporary release programs was conducted by the office of the Inspector General. This review was guided by the new statutory requirements and by existing statutory regulations. The office of the Inspector General submitted recommendations for rejection from the program. These recommendations were reviewed by the Executive Deputy Commissioner and the special review team.

Lastly, a special review team composed of staff members from the Central Office temporary release staff and headed by the Associate Commissioner reviewed all of the cases recommended for rejection by the superintendents and the office of the Inspector General. From these cases a group of inmates were selected for rejection and those names were added to the master list for removal from the program. The remaining names were added to the list for retention in the program.

As a result of this exhaustive review , 824 prisoners participating in temporary release programs were screened.

On August 25, 1977, 140 of those prisoners were removed from the program.* While several prisoners were automatically barred from the program because they were convicted of an escape or absconding offense, the remaining prisoners who needed the express approval of the Commissioner were removed because the Commissioner found them to be a threat to the safety of the community and unsuitable to participate in the program. N.Y. Correction Law ,§ 851(2). (A. 96, 102).

The Department placed written notices in the case files of all those inmates removed from the program which provided that the temporary release status of the inmate was revoked due to changes in the law and not because the inmate committed any infraction. The notice also provided that the inmate may reapply for a program and no adverse inferences are to be drawn from the revocation nor is it to be construed as a recommendation against parole.

*Of the 140 inmates originally removed from the program, approximately 77 remain in the class as a result of parole releases and the Court's exclusion from its order of escapees and inmates whose next parole appearance is later than September 2, 1978. (A. 90-91).

Federal Proceedings

On August 11, 1977, a complaint was filed pursuant to 42 U.S.C. § 1983 challenging the scope of due process rights afforded a work releasee charged with misconduct at a Superintendent's Proceeding. (A. 13-28). Plaintiffs alleged that the due process rights which applied at a parole revocation hearing should also be applied to a work release revocation hearing.

After the revocation of the 140 inmates, plaintiffs amended their complaint on September 13, 1977 to include those inmates as a sub-class. Plaintiffs sought, inter alia, to have the defendants' policies and procedures in removing the plaintiffs from the temporary release program declared unconstitutional as a violation of the due process clause; to enjoin any future removals without a prior hearing complete with the requirements of Morrissey v. Brewer, 408 U.S. 471 (1972); an order directing the Commissioner of the Department of Correctional Services to reinstate plaintiffs to temporary release status; and an order directing that any reference to the removal of plaintiffs from temporary release status be fully expunged. (A. 32-52).

After several conferences with the District Court (A. 62), Judge Lasker, in an opinion dated October 14, 1977, found that

the revocation of the plaintiffs from the temporary release program constituted a grievous loss of a liberty interest. The Court further stated that an entitlement to continued participation in the program was established by the defendants' history and prior practice of operating the temporary release program. The Court stated that the defendants' practices created a reasonable expectation by the inmate that he would be permitted to continue in the program so long as he did not commit an infraction. (A. 81-94).

The District Court concluded that the revocation of participation in the temporary release program could not occur without a due process hearing and ordered the reinstatement of the plaintiffs and enjoined their removal from the program except under the same terms and conditions which existed immediately prior to the removals in August, 1977. The District Court, however, specifically excluded from his order those members of the plaintiff class who were alleged to have been convicted of escaping or whose next Parole Board appearance was not within one year of the effective date of the new temporary release statute. (A. 90-91).

On October 26, 1977, defendants filed a motion to alter or amend the Court's judgment pursuant to Rule 59(e) of

the Federal Rules of Civil Procedure. The defendants' motion was premised on the grounds that the Court's order of reinstatement seriously infringed upon the discretionary authority vested in the defendants to control the operation of the temporary release program and imperiled the safety of the community by requiring the release of dangerous inmates. The defendants also sought to clarify the various ramifications of implementing the Court's order of reinstatement. (A. 106-128).

In an opinion dated November 7, 1977, the District Court denied the defendants' motion to alter or amend its prior judgment. The Court went on to find that none of the plaintiffs may be removed from the program on claims that their participation constitutes a threat to the safety of the community unless there is a showing at a due process hearing that a change of facts has occurred since the original decision admitting the inmate into the program, or a discovery of new facts which were originally unknown to the defendants through no fault of their own and through no lack of reasonable diligence on their part. The Court ordered the reinstatement of the plaintiffs considered security risks unless they were afforded a due process hearing within twenty days of the order. (A. 128-130).

POINT I

THE DUE PROCESS CLAUSE DOES NOT
APPLY TO REVOCATIONS FROM THE
TEMPORARY RELEASE PROGRAM PURSUANT
TO A CHANGE OF LAW.

The Supreme Court has clearly enunciated that not every state action resulting in adverse consequences for prisoners automatically invokes the procedural requirements of the Due Process Clause. Meachum v. Fano, 427 U.S. 215, 224 (1976); Montanye v. Haymes, 427 U.S. 236 (1976); Moody v. Daggett, 429 U.S. 78, 88 N. 9 (1976); see also Cafeteria and Restaurant Workers v. McElroy, 367 U.S. 886, 894 (1961).

The prisoner's interest in the temporary release program must be one of constitutional magnitude and fall within the contemplation of the "liberty" or "property" language of the Fourteenth Amendment before the procedural due process requirements apply. Board of Regents v. Roth, 408 U.S. 564, 570 (1972); see Arnett v. Kennedy, 416 U.S. 134, 164-165 (1974); Perry v. Sinderman, 408 U.S. 593 (1972); Morrissey v. Brewer, 408 U.S. 471, 481 (1972). Due process is a flexible concept which varies with the "nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding." Hannah v. Larche, 363 U.S. 420, 442 (1960); Mathews v. Eldridge, 424 U.S. 319 (1976); Wolff v. McDonnell, 418 U.S. 539 (1974).

When a prisoner claims he is entitled to constitutional due process, the threshold question to be resolved is whether there is a "grievous loss" of a liberty or property interest. See Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring); Goldberg v. Kelly, 397 U.S. 254, 263 (1970); Morrissey v. Brewer, supra at 481. While the revocation from a temporary release program may result in the forfeiture of certain privileges when the prisoner is transferred from a work release facility to a more secure institution, it does not constitute a grievous loss of a liberty interest. See Durso v. Rowe, 430 F. Supp. 49 (N.D. Ill. 1977).

In Meachum v. Fano, supra, wherein the Court held that the transfer of an inmate from one prison to a less favorable prison did not warrant due process safeguards, the Court stated:

"We cannot agree that any change in the conditions of confinement having a substantial adverse impact on the prisoner involved is sufficient to invoke the protections of the Due Process Clause. ...

"Neither, in our view, does the Due Process Clause in and of itself protect a duly convicted prisoner against transfer from one institution to another within the State Prison

System. Confinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose. That life in one prison is much more disagreeable than in another does not in itself signify that a Fourteenth Amendment liberty interest is implicated when a prisoner is transferred to the institution with the more severe rules." (at 224-25).

Assuming arguendo that this Court concludes that a grievous loss was suffered by the revocation of a temporary release program, this finding alone would not mandate the application of due process rights. As the Court in Meachum, supra at 224, observed, not "[every] grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the due process clause." In addition to showing a grievous loss of a liberty interest, plaintiffs must also demonstrate that they have "an entitlement" to this liberty interest arising out of state law. Meachum v. Fano, supra.

- A. Any interest a prisoner may have in the temporary release program is not rooted in the state statutes, rules or regulations governing the administration of the program.

A legitimate claim of entitlement warranting due process protection exists only when the State has bound itself by statute, rule or regulation to follow, or refrain from

following, a specified course of action on the basis of determinable facts. See Goss v. Lopez, 419 U.S. 565 (1975); Arnett v. Kennedy, supra at 181. Where the State has bound itself to confer or extend a benefit, the due process clause requires the implementation of procedures to insure that the benefit will not be summarily revoked. The Court in Meachum v. Fano, supra at 226, remarked that:

"The liberty interest in Wolff has its roots in state law, and the minimum procedures appropriate under the circumstances were held required by the Due Process Clause 'to insure that the state-created right is not arbitrarily abrogated.' 418 U.S. 539, 557."

In the instant case, there is neither a legitimate claim of entitlement nor a "state-created right" to participate or remain in the temporary release program. On the contrary, both state law and rules clearly indicate that participation in a temporary release program is a privilege revokable at any time and no right to participate or remain in the program is conferred upon the inmate. N.Y. Correction Law, § 355(9) (§ 853[8] of expired statute).

Moreover, the temporary release agreement form explicitly informs the applicant that his participation is a "privilege which may be revoked at any time." N.Y. Correction

Law, § 855(6) (§ 853[6] of expired statute) (A. 59 and 60). As a condition to his admission into the program, the inmate agrees to be bound by the terms of the agreement and signs his name thereto.

The District Court cavalierly circumvents the language in the statute and form agreement by stating that it is unreasonable to assume that a prisoner will know the contents of a statute and that a natural reading of the agreement indicates that removal is not discretionary, but only occurs after misconduct by the prisoner. Even if we were to assume that a prisoner was unaware of the controlling statute which is far from a safe assumption in view of the many jail-house lawyers today, the defendants must be able to rely on the language in the agreement which the inmate must read and sign. The District Court's interpretation of the language in the form is unwarranted in light of the clear and unambiguous terms used in the form agreement.

The District Court further found that the practice of the defendants since the initiation of the program was to revoke temporary release status only upon a showing of misconduct and that this practice created a reasonable expectation by the prisoner that he would remain in the program as long as he did not commit an offense. However, at a conference held

by the Court, Martin Horn, Director of the Temporary Release Program, informed the Court that inmates were removed from the program for reasons other than misconduct, such as a change in the inmate's attitude which no longer made him suitable for a work release program. (A. 62-70).

In Montayne v. Haymes, supra at 243, where an inmate was transferred from one state maximum security facility to another, the Court noted that the inmate, under New York state law, "had no right to remain at any particular prison facility and no justifiable expectation that he would not be transferred unless found guilty of misconduct."

In Meachum v. Fano, supra at 228, the Court reasoned that:

"Whatever expectation the prisoner may have in remaining at a particular prison so long as he behaves himself, it is too ephemeral and insubstantial to trigger procedural due process protections as long as prison officials have discretion to transfer him for whatever reason or for no reason at all."

Thus, the Supreme Court has convincingly demonstrated and that where no "state-created right" is conferred upon the inmate^{and} prison officials have the discretion to change an inmate's status for any reason, any expectation an inmate may have to maintain that status is unilateral and unjustified.

- B. The State Legislature has the undisputed authority to redefine the eligibility requirements for the temporary release program.

The 140 inmates removed from the temporary release program were revoked because they were no longer considered eligible to participate in the program under the new statute. Those inmates who were convicted of the specific crimes specified in § 851(2) and needed the approval of the Commissioner were rejected by the Commissioner as being a threat to the safety of the community.

The State Legislature has the unquestioned power to make substantive changes in its laws. The Legislature could have simply abolished the temporary release program and reinstated it for only those inmates who satisfied the new eligibility requirements. Cf. Richardson v. Belcher, 404 U.S. 78 (1971); Rasmussen v. Toia, 420 F. Supp. 757 (S.D.N.Y. 1976) (three-judge court); Irizarry v. Weinberger, 381 F. Supp. 1146 (S.D.N.Y. 1974) (three-judge court). As the Court in Rasmussen v. Toia, supra at 766, stated:

"The truth of this proposition follows from the undoubted power of the legislature simply to abolish the entire Home Relief program and immediately reinstate it for those persons in compliance with the new eligibility guidelines. (citations omitted). Such a legitimate two

stage procedure does not become constitutionally infirm because the Legislature collapses it in a single step."

While the Legislature could have eliminated the temporary release program, it merely sought to restrict eligibility in the program as a result of the number of crimes committed by work releasees. Plaintiffs cannot insist upon their continuation in the program on the same terms and conditions under which they were initially found eligible due to the amendment in the law. See Cf. Richardson v. Belcher, supra at 80; Lavine v. Milne, 424 U.S. 577 (1976).

POINT II

THE DISTRICT COURT'S ORDER OF REINSTATEMENT SERIOUSLY INFRINGES UPON THE DISCRETIONARY AUTHORITY VESTED IN THE DEFENDANTS AND GREATLY JEOPARDIZES THE SAFETY OF THE COMMUNITY.

The overriding consideration of the Department of Correctional Services in determining which inmates may participate in the temporary release program and be released into the community is the safety of the community. The Department is mandated by statute to weigh the safety of the community when deciding whether to admit an inmate into the program. Sections 352(1) and 855(4) of the New York Correction Law

emphasize the Department's grave concern for the safety of the community.

The Department's concern for the welfare of society is also reflected in Sections 852(5) and 855(8) which require close supervision of all inmates participating in the program by parole officers and notification to the sheriff of the community into which the inmate is to be released at least three days before such release. Section 855(9) which permits the Superintendent of an institution to revoke an inmate's privilege to participate in the program at any time is predicated on the belief that it is necessary for the Department to take immediate action when it discovers that an inmate's behavior endangers the safety of the community. (A. 56-57). The ability to take swift action with inmates participating in the temporary release program is required since prior notice to the inmate that he might be revoked from his program may cause him to abscond. Sections 851, et seq. of the New York Correction Law are interwoven with numerous safeguards to protect the community.

In Sanno v. Preiser, 397 F. Supp. 560, 561 (S.D.N.Y. 1975), Judge Weinfeld observed the importance of the community's safety by stating:

"Consideration of public safety as a factor in evaluating temporary release applications is mandated by statute and rules and regulations promulgated pursuant thereto. The experience of the Department of Corrections and its interpretation of the results of other states' experience with temporary release programs has led it to conclude that the interest of community safety requires strict controls over inmate participation in these temporary release programs" (footnotes omitted).

Similarly, the Court in Hale v. Davis, 387 F. Supp. 408, 410 (W.D. Va. 1974) stated:

"A proper concern of all prison officials is the protection of society from potential escapes by prisoners. Since the Work Release and Furlough Programs contain a high degree of risk to the community, prison officials should formulate guidelines which will insure the safety of the community."

The decision of whether an inmate is a proper candidate for participation in a temporary release program is a discretionary one within the authority of the temporary release committee, the Superintendent and/or the Commissioner. See §§ 852(1) and 855(3) N.Y. Cor. Law; Sanno v. Preiser, supra at 562; Marquez v. Warden, 387 F. Supp. 565 (S.D.N.Y. 1974).

The decision of the District Court ordering the reinstatement of the plaintiffs in the temporary release program has the effect of meddling in matters particularly within the province of prison authorities. The Supreme Court has consistently held that it is improper for the federal judiciary to entangle itself in discretionary matters that are not the business of federal judges. See Meachum v. Fano, *supra*, at 229; Preiser v. Rodriguez, 411 U.S. 475, 491-492 (1973); Johnson v. Avery, 393 U.S. 483, 486 (1969); Frazier v. Ward, 426 F. Supp. 1354, 1371 (N.D.N.Y. 1977). The federal courts do not sit to supervise the daily functions and operations of the Department of Correctional Services. See Cruz v. Beto, 405 U.S. 319, 321 (1972).

The Court's order of reinstatement improperly supplants the discretionary judgment of the Department that the plaintiffs are a threat to the safety of the community and are ineligible to participate in the temporary release program. This judgment by the Department was made after an exhaustive review of all the participants in the program. The Department's discretionary judgment as to whether a prisoner should participate in a program involves numerous subjective and objective factors and should be afforded great deference by the Court, especially in matters of security and prison administration. See Jones v. North Carolina Prisoners' Labor Union, Inc., 97 S.Ct. 2532, 2538 (1977); Procunier v. Martinez, 416 U.S. 396, 404-405 (1974); Baldwin v. Smith, 446 F. 2d 1043, 1044 (2d Cir. 1971). The Court's limitations on

what information the Department may consider at a hearing on a prisoner's eligibility is totally unreasonable and in direct contravention of the Commissioner's duty to safeguard the public. (A. 129-130).

It is of paramount importance that the decision of which inmates may participate in the temporary release programs and which inmates may be released into the community remain within the domain of the Department. No other body or officer has the necessary experience or information to properly make such a determination. The District Court had none of the necessary factual information before it to make the decision as to the inmates' suitability for release into the community.

In Lewis v. Oliver, 397 F. Supp. 1204 (E.D. Va. 1975), a similar set of facts existed to the case at bar. In Lewis, the furlough program was relaxed during the summer of 1973 to enable greater participation in the program. However, the furlough eligibility requirements were tightened again in October, 1973. In rejecting the claim that the program was arbitrarily administered, the Court stated that:

"[S]tate correctional officers must be accorded great latitude in administering experimental rehabilitative programs, such as the furlough program, and that, absent allegations that furlough programs are administered arbitrarily or deny equal protection, the Court will not second guess the judgments of prison authorities in determining eligibility for furloughs." (citations omitted).

"Prison officials do not violate the Constitution when they attempt to 'fine-tune' an experimental program in order to strike the balance of interests which will best promote rehabilitation of inmates while, at the same time, protecting society." (397 F. Supp. at 1206).

Even if this Court is inclined to order immediate reinstatement of the plaintiffs, the Department must retain the authority to decide where the inmates will be housed. The District Court directed the defendants to return the inmates to the same facilities where they were before removal, if possible. (A. 116-119). It would be hazardous to the safety of the community to allow the more dangerous inmates to be housed in temporary release facilities in New York City because there is insufficient security to prevent an inmate from absconding.

The District Court has failed to give due consideration to the welfare of society in ordering the defendants to reinstate plaintiffs in the program. The Court's order of reinstatement also conflicts with the unparalleled duties of the Department to insure the safety of the community and to prevent dangerous prisoners from being prematurely released into society.

CONCLUSION

THE ORDERS OF THE DISTRICT COURT
SHOULD BE REVERSED.

Dated: New York, New York
November 23, 1977

Respectfully submitted,

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

VALERIE MONTERA , being duly sworn, deposes and
says that she is employed in the office of the Attorney
General of the State of New York, torney for defendants-appellants
herein. On the 25 day of ber , 1977, she
served the annexed upon the following named person :

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Prisoners' Legal Services of New York
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New York, New York 10007

Attorney in the within entitled proceeding by depositing
a true and correct copy thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by
the Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorney at the
address within the State designated by her for that purpose.

Valerie Monter

Sworn to before me this
25 day of November , 1977

Kevin J. W. Kay
Assistant Attorney General
of the State of New York